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In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

MILTON MILLER, Individually and as Trustee, Defendant, Cross-complainant, Appellant, Court below,
Petitioner,

vs.

CITY OF BAKERSFIELD, Plaintiff, Cross-defendant, Respondent, Court below,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSEPH J. KARLIN
188 W. Randolph St.
Chicago Illinois 60601
Attorney for Petitioner

KARLIN, COE & SOLOMON
Of Counsel

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To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, Milton Miller, individually, and as Trustee, respectfully prays for the issuance of a Writ of Certiorari to review the Judgment of the Supreme Court of the State of California, entered on the 4th day of February, 1966. A motion for rehearing was denied on the 2nd day of March, 1966.

OPINIONS BELOW

The cause was originally tried in the Superior Court of the State of California, in and for the County of Kern, case No. 81886, in which a finding was entered against the Petitioner, Defendant, (Appendix A) from which an Appeal was taken to the District Court of Appeals for the State of California in and for the Fifth Appellate District 5 Civil #472 in which the Appellate Court reversed the finding of the Trial Court holding that Petitioner's constitutional rights have been abridged, entered Sept. 27, 1965, reported 237 A.C.A. 284, (Appendix B.) From this decision, a rehearing petition was filed to the Supreme Court of the State of California by the Plaintiff, Respondent in these proceedings, L.A. 28224, in which the Supreme Court of the State of California entered its Judgment reversing the Appellate Court and sustaining the Judgment of the Trial Court, reported 64 A.C. 95 (Appendix C.) A motion timely made for rehearing was thereafter denied, March 2nd, 1966.

JURISDICTION

The Judgment of the Supreme Court of the State of California was entered on the 4th day of February, 1966. A Motion for rehearing timely made was denied on the 2nd day of March, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Sec. 2101(c)

QUESTIONS PRESENTED

1. Whether the action of the City of Bakersfield Building Department, posting large signs upon the entrance ways of petitioner's hotel building, which signs stated: "Do Not Enter—Unsafe for Occupancy", without giving petitioner a prior hearing either judicial or quasi-judicial, was a taking of petitioner's property without due process of law, in violation of his constitutional rights under the

Fourteenth Amendment to the Constitution of the United States.

2. Whether the action of the Building Department in requiring of the petitioner, modification to petitioner's building to an extent greater and more extensive than that which was required under the Building Code of the City of Bakersfield; and for which there was no statutory basis, was unreasonable, arbitrary and capricious, as to constitute the taking of petitioner's property without due process of law in violation of petitioner's constitutional rights under the Fourteenth Amendments of the Constitution of the United States?

3. Whether Section 203 of the Building Ordinance, is an unlawful delegation of legislative, judicial and executive power in a single person so that it is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the holding by the Supreme Court of California that it is a usurpation of judicial authority for the Court to exercise its independent judgment to review legislative acts for a determination as to whether a law or ordinance is fair, reasonable and necessary under the police powers, and by so holding, was this a denial of petitioner's constitutional rights as guaranteed by the Fourteenth Amendments to the Constitution of the United States?

5. Whether the injunctive order issued by the Trial Court was so vague, uncertain and indefinite that the possible enforcement of it by criminal sanction or contempt proceedings deprives the petitioner of his constitutional rights under the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY LAW INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Uniform Building Code, City of Bakersfield Sec. 203—a, b, c, d, e,

Sec. 205—

See Appendix D for text pp. 44a, 45a, 46a.

Chapter 13—Existing Buildings.

Sec. 1309.

See Appendix E for text pp. 47a, 48a, 49a.

State Code California—§17980 Administration Enforcement see Appendix F for text, pp. 50a, §17981, Appendix G pp. 51a.

STATEMENT OF THE CASE

This case arises out of an action in equity brought by the City of Bakersfield in the Superior Court of the State of California in and for the County of Kern, Case No. 81886, the Bill of Complaint charging that the defendants, Milton Miller, Individually and as Trustee as the owner and operator of the Hotel Padre located in the City of Bakersfield, did not conform to the then existing Building Code adopted by reference as the Uniform Building Code, 1958

Edition, which was adopted by the City Council of Bakersfield, as Ordinance Number 1242, New Series on the 11th day of May, 1959. The particular section of the Code for which violations were claimed was under Chapter 13, Section 1309, charged that:

"The interior stairways of the Padre Hotel are not enclosed with walls of not less than one-hour fire resistive construction as required by Section 1309(f) of the Uniform Building Code nor do said interior stairways otherwise meet the requirements specified in the aforesaid code section as set forth in Exhibit 'D'.

"The two fire escapes in existence at the Padre Hotel, one on the side of the building on 18th Street and one at the 18th-19th Street alley, do not extend to the ground nor are they provided with counterbalanced stairs as required by Section 1309 (h) of the Uniform Building Code as set forth in Exhibit 'D.'

"The Padre Hotel contains elevator shafts and dust shafts which are not enclosed as required by Section 1309(k) of the Uniform Building Code as set forth in Exhibit 'D'?

"The Padre Hotel contains transoms and openings, other than doors, which are not fixed closed and covered with a minimum of three-fourths inch (¾") plywood as required by Section 1309(i) of the Uniform Building Code as set forth in Exhibit 'D'.

"The Padre Hotel contains a boiler room or heater room in the basement which is not separated from the rest of the building by a "Four-Hour Fire Resistive Occupancy Separation" as required by Section 1309(l) of the Uniform Building Code as set forth in Exhibit 'D'.

"The Padre Hotel contains exit doorways or changes of direction of corridors that are not marked with well lighted exit signs having letters of at least five

inches (5") high as required by Section 1309(j) of the Uniform Building Code as set forth in Exhibit 'D'.

"Defendants have failed and refused to correct all or any part of the hereinabove alleged violations of the Uniform Building Code."

The prayer of the complainant is as follows:

1. That this Court determine that the Padre Hotel is an unsafe building within the meaning of Section 203(a) of the Uniform Building Code, Volume 1, 1958 Edition.

2. That defendants and each of them be ordered to commence the correction of said violations and further that this Court set a reasonable time limit for completion of the work.

3. That the defendants and each of them be ordered to vacate the Padre Hotel and to cause all tenants to vacate said premises until such time as the correction of said violations.

4. For plaintiff's cost of suit.

5. For such other, further and different relief as in the Court may seem just and proper (Tr. 24).

The Bill of Complaint made no allegations that the building was actually unsafe for occupancy or that it constituted a public nuisance, but merely alleged that the ordinance requirements were not met and that the court declare the property by reason thereof an unsafe building within the meaning of Section 203(a) of the Uniform Building Code, Volume 1, 1958. The defendant filed an answer to the complaint (Tr. 44) and a cross-complaint (Tr. 68). As defense, the answer charged that the City of Bakersfield had violated his constitutional rights as guaranteed by the Fourteenth Amendment of the Consti-

tution of the United States in that the demands made upon the defendant by the City of Bakersfield were arbitrary, capricious, unreasonable and unlawful; that the City of Bakersfield made demands for alterations upon petitioner's property that exceeded the requirements of the Building Code; that the hotel is not an unsafe building; that the Hotel Padre is an eight-story, reinforced steel, concrete building of non-combustible material, rated by underwriters as fireproof; that the City without due process and without a hearing posted upon all the entranceways of the hotel signs for public view stating: "DO NOT ENTER—UNSAFE FOR OCCUPANCY"; that the posting on the entrance-ways of the hotel by the City of Bakersfield of signs stating: "DO NOT ENTER—UNSAFE FOR OCCUPANCY", was an unlawful seizure of petitioner's property in violation of his constitutional rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States; that the acts of the officials of the City of Bakersfield were oppressive, arbitrary, unreasonable, wilfull and capricious and did not constitute a reasonable exercise of authority by the City under its police powers but to the contrary, deprived the petitioner of his business and his property without due process of law and in violation of his constitutional rights as guaranteed by the Fourteenth Amendment of the Constitution of the United States; the cross-complaint filed by petitioner requested that the Court decree that the posting of the signs by the City of Bakersfield upon the hotel premises of the petitioner was a complete destruction of petitioner's lawful business, was unconstitutional and a seizure of petitioner's business without due process of law.

The Superior Court of Kern County found the issues for the plaintiff and against the defendant upon the com-

plaint and against the cross-complainant upon the cross-complaint (Appendix A). From this judgment the defendant, this petitioner, and cross-complainant appealed to the Court of Appeals for the State of California in and for the Fifth Appellate District. The Appellate Court reviewed the evidence in the proceedings in the Trial Court and rendered an opinion on the 27th day of September, 1965, holding that the trial court erred in finding the issues for the plaintiff and against the cross-complainant. The judgment of the trial court was reversed (Appendix B).

The Court of Appeals in substance held:

1. That petitioner was denied his constitutional rights under the Fourteenth Amendments of the United States Constitution. That the posting of the signs upon petitioner's building, "Do Not Enter—Unsafe for Occupancy," was taking of the petitioner's property and destroying petitioner's business without a hearing and an unconstitutional seizure.

2. That the petitioner's constitutional rights were violated when the City failed to give due notice prior to the institution of any suit to the petitioner to abate the nuisance as required by state statute.

3. That the City demanded alterations which were unreasonable and oppressive and beyond the requirements of the ordinance.

4. That the injunctive order is vague and uncertain and, therefore, void.

5. That the complaint upon which this suit is based did not charge the respondent with maintaining a nuisance and no finding was made that a nuisance in fact existed; that the entire complaint in the proceeding was based on

the defendant, petitioner, in failing to make the improvements as required by the City Code, which provided for criminal sanctions if violated; that without an allegation in the Bill of Complaint that a nuisance in fact did exist, and proof thereof, the Bill should have been dismissed.

A petition for rehearing was filed with the Supreme Court of the State of California by the City of Bakersfield; and, based upon this petition for rehearing, the Supreme Court sustained the trial court and reversed the judgment of the Appellate Court (Appendix C).

The essential facts in this case are not in dispute. The Appellate Court made a finding of facts and record of the case, and its findings of fact as shown in its opinion are not disputed. The Hotel Padre is an eight-story, steel reinforced, concrete fireproof building located in the main downtown section of the City of Bakersfield. It was built in 1929 and conformed to all of the building regulations and codes then in existence. There are no findings of the trial court that the hotel property was deteriorated, inadequately maintained, dilapidated, abandoned or structurally unsafe. The findings of the trial court were confined strictly to the conclusion that the owners and operators of the hotel did not make the corrective alterations as required under Section 1309 of the 1958 Building Code and did, upon this finding, enter its injunctive order directing the owners to immediately close down the hotel from the second to the eighth floors, and cause all tenants to vacate said premises from these floors.

It is undisputed that the posting of the signs upon the hotel premises by the City of Bakersfield: "DO NOT ENTER—UNSAFE FOR OCCUPANCY," was a determination by the Building Department officials of the City, and it was their independent judgment and act which

induced the posting of these signs; that no hearing was granted to this petitioner, judicial or quasi-judicial, prior to the posting of these signs.

The Building Code under Section 1309(f) (Appendix E) provides as follows, with regard to the closing of the stairwells and transoms:

> "Enclosures shall not be required if an automatic fire-extinguishing system is provided for all portions of the building except bedrooms, apartments, and rooms accessory thereto."

That the City officials would not accept the method as provided in the Code, *i.e.*, an automatic fire extinguisher system for all portions of the building except bedrooms, apartments and rooms accessory thereto, but demanded of petitioner that if a sprinkler system was to be installed, sprinkler heads were to be installed in every room, sleeping rooms, closets, bathrooms, and all accessory rooms thereto in the entire building (R.T. 69, 70, 72, 73, 135-136). The costs for installing a sprinkler system merely in the stairwells and in the corridors would come to approximately $19,000.00 (R.T. 70, 136-137).

That the cost to make the installation as demanded by the Building Department of the City would come to approximately $55,000.00 for just the heads alone and to make the rooms esthetically useful again another $60,000.00.

It is undisputed that the costs entailed as required by the demands of the City exceeded the equity value of the hotel at that time.

It is undisputed that the other requirement of the City that an additional fire escape be installed in the hotel was complied with by the petitioner (R.T. 120).

It is undisputed that no basement area of the hotel property contained 1,800 square feet of floor space.

It is an undisputed fact that the hotel used gas for heating and not a solid or liquid fuel, and no sprinkler system was specified for basement using gas for fuel (R.T. 145-146).

That on July 31, 1953, just prior to the acquisition of petitioner's interest in said hotel, the Chief Building Inspector of the City of Bakersfield addressed a letter to the hotel's architect, as follows (R.T. 21):

> "Dear Mr. Eddy:
>
> This is to inform you that the structural rehabilitation work, of the subject building, has been accepted by the City Building Department as substantially complete in accordance with the plans and specifications, approved by this office on May 11, 1953. *This building is considered safe for occupancy.*
>
> Very truly yours,
> /s/ J. A. Olsson
> Chief Building Inspector."
>
> (Italics added.)

That there has been no change in the physical structure of the hotel and its general physical character since the writing of this letter.

The facts above stated are confirmed in the finding of the Appellate Court, are the facts of this case, and are not contradicted by either the findings of the trial court or the findings of the Supreme Court of the State of California.

BASIS FOR FEDERAL JURISDICTION

The jurisdiction of the Federal Court in this matter is invoked pursuant to 28 U.S.C., Section 1257 (3) Sec. 2101(c) to review the judgment of the State of California Supreme Court on a matter concerning the violation of the petitioner's constitutional rights as guaranteed under the Fourteenth Amendment to the Constitution of the United States that the judgment of the Trial Court which was sustained by the Supreme Court of the State of California are a denial of petitioner's constitutional rights and in conflict with the well established principles and decisions of the United States Supreme Court. The issues involve a substantial Federal question.

REASONS FOR GRANTING WRIT

I.

The posting of signs on petitioner's hotel, "DO NOT ENTER—UNSAFE FOR OCCUPANCY," prior to a judicial or quasi-judicial hearing given to petitioner, was an unconstitutional seizure of petitioner's property by the building officials of the City of Bakersfield and a taking of his property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The City contends that it acted under authority granted by the Building Code, Section 203(a) (Appendix D). It is our contention that this section of the building code is unconstitutional. It delegates authority in the building official of the City of Bakersfield with the following powers:

1. To determine what in his own judgment would constitute an unsafe building.

2. To set his own standards what in his personal judgment would be the necessary repairs required to make the building safe.

3. Authorizes the building official to post a sign upon the premises, such signs reading: "DO NOT ENTER—UNSAFE FOR OCCUPANCY," with a prohibition against anyone entering the premises.

4. Authorizes the building official to make repairs or to demolish the building.

All without prior hearing, either judicial or quasi-judicial, being given to the owner. Such an ordinance is an unlawful delegation of power, judicial and legislative, in a building official. It permits the taking of property or the destruction of same without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Under our Constitution, private property should not be seized or destroyed by the government or governmental agency without the owner first being given an opportunity to be heard.

This ordinance confers upon the building official the right to condemn private property, to close down the business of the owner and to demolish the property, all based on the independent determination and judgment of the building official without any hearing being provided for, either quasi-judicial or judicial.

The Appellate Court, in its opinion discussing this subject, held as follows: (Appendix D 27a)

> "In a case like this the City administrative officials can determine for themselves the questions involved without a formal hearing, then, through whim or caprice, or honest but mistaken zeal, they can force

almost any hotel or apartment owner out of business."

"The Fourteenth Amendment to the United States Constitution requires, as a normal preliminary to the posting of such signs in the circumstances developed by the present record, a hearing and a consequent finding on the evidence that the premises are in fact unsafe."

"But, if Section 203(a) of the ordinance is left wholly in the hands of city officials to enforce without a proper preliminary hearing, it delegates to administrative action the exercise of judicial, or semi-judicial, functions without the protection inherent in constitutional safeguards. The decree in the case should have so held."

The Supreme Court, in reversing the decision of the Appellate Court, held as follows: (Appendix C 43a)

"The Cross-Complaint, in which defendant sought relief from the posting of signs on his premises without an opportunity to be heard, was properly dismissed. The trial itself constituted a public hearing on the matter."

This conclusion by the Supreme Court ignores completely the well settled doctrine that the petitioner's property and business should not be taken or destroyed without a prior hearing and judicial determination. The action of the administrative officials of the City of Bakersfield was an arbitrary, wilfull destruction of petitioner's property before suit and before trial and the fact that a trial was subsequently had is no cure or answer for the wrongful taking by the City of the petitioner's property prior to judicial proceedings. A judicial hearing, before the taking, is a constitutional right of every citizen. *Truax* v. *Corrigan*, 257 U.S. 312, p. 129, 42 Sup. Ct. 332:

". . . The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

And this Court has so held in the case of *Garfield* v. *Goldsby,* 211 U.S., 249. This case involves a situation where the plaintiff brought an action against the Secretary of the Interior for having arbitrarily and without a hearing, struck his name from a registration roll which would have allotted him certain lands. The Secretary, contending that the name did not belong on this roll and it was improperly placed there. This Court there held that the name of the plaintiff on the roll was a property right and to strike it from the roll without hearing was a taking of property, that his name might have been stricken upon a hearing or trial was not the issue.

The Court stated, page 262:

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

The Court further stated, page 264:

"The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.

For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made."

II.

The building officials of the City unreasonably and arbitrarily acting under the authority of Section 203 of the Building Code, (a) (appendix D) made a demand upon the petitioner to make alterations on his hotel property, that exceeded the requirements of the standards stated in the Code, under Section 1309, the demand regarding enclosing of stairwells, however, was not confined to the provisions of Chapter 13, Section 1309 of the Code covering existing buildings. Section 1309 (f) provided as follows: (Appendix E)

"Enclosures shall not be required if automatic fire extinguisher system is provided for all portions of the building except bedrooms, apartments and room accessory thereto."

The demand by the building official upon this petitioner; that if he was to install an automatic fire extinguishing system that he would have to place sprinkler heads throughout the entire building, including every room, closet, bedroom, bathroom and all accessory rooms of the entire hotel.

The action of the city official in demanding that alterations be made beyond and above the standards as provided for under Section 1309 of the Building Code was unreasonable, arbitrary and capricious.

The Appellate Court in discussing the arbitrary exercise of police powers, held as follows: (Appendix B7a)

"The police power of a state is an indispensable prerogative of sovereignty and one that is not to be

lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. (*Hadacheck* v. *Sebastian*, 239, U.S. 394 Ann. Cas. 1017B 927, 60 L. Ed. 348, 36 S. Ct. 143); *District of Columbia* v. *Brooke*, 214 U.S. 138, 149 (53 L. Ed. 941, 29 S. Ct. 560, see, also, *Rose's U.S. Notes*). It is not, however, illimitable and the marking and measuring of the extent of its exercise and application is determined by a consideration of the question of whether or not any invocation of that power, in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals. (*Hannibal, etc. R.R. Co.* v. *Husen*, 95 U.S. 465, 470, 471 (24 L. Ed. 527); *Boston Beer Co.* v. *Massachusetts*, 97 U.S. 25 (24 L. Ed. 989).), or general welfare of the people of a community. (*Chicago, B. & Q. Ry. Co.* v. *Illinois*, 200 U.S. 561, 592 (4 Ann. Cas. 1175, 50 L. Ed. 596, 26 S. Ct. 341, see, also Rose's U.S. Notes)."

"The police power does not *ipso facto* give a right to the state or to a municipal corporation to do anything it pleases. If an attempted law or regulation does not bear a substantial relation to the public health, safety, morals, or general welfare, or is arbitrary, or unreasonable, its attempted execution will be stricken down."

The Appellate Court held on page 295; (Appendix B 9a)

"The discretion of the Legislature is not absolute. The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained."

The evidence in the case which is not disputed; that to make the alterations as provided for under Section 1309, that is, to install a sprinkler system in the hotel, excluding therefrom the hotel rooms and accessories thereto, would

have come to $19,000.00. The cost to make the alterations as demanded by the Building Official would have come to $55,000.00 and then to make the rooms aesthetically acceptable for public use would require an additional expenditure of $65,000.00, making a total of $120,000.00. This cost was known to the Building Official and the Building Official knew or should have known that because of general conditions in the hotel business in downtown Bakersfield, that such an installation would be economically unfeasible, and as contended by petitioner, financially impossible. Petitioner offered to make the installation in accordance with the standards stated in Section 1309, but this was refused by the building official who insisted that his own standards be conformed to, or close down the hotel. The petitioner in the complaint filed in the Trial Court, charged the City with discrimination against petitioner. Whether this discrimination, demanding alterations far out of the purview of the Code so that it would be an economic burden upon the petitioner as to practically compel the petitioner to abandon the hotel or whether it was overzealousness is difficult to say, but that the demands of the City were arbitrary and unreasonable, is evident and constituted a taking of petitioner's property without due process.

It cited the case in which Justice Holmes, speaking for the Supreme Court of Massachusetts in *Rideout* v. *Knox*, 148 Mass. 368:

> "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain."

III.

The suit instituted by the city was not to abate a nuisance but was brought merely to execute the City's Decree. The City of Bakersfield, in further reliance upon the provisions of Section 203 (a) of the Building Code, instituted their suit on the theory that the building officials, having made demands upon the petitioner, as the owner of the hotel, to make alterations, the extent of which they personally set, and petitioner having failed to make these alterations, requested the Court to carry out by injunctive decree the execution of their determination to close the hotel.

The Building Code, 1242, makes no provision for its enforcement by Civil proceedings. The Code merely provides for criminal penalty for violations; a fine of $300.00 per day or six months or both. (Appendix D)

Section 3369 (Appendix H) of the Civil Code of California provides neither specific nor preventive relief can be granted to enforce a penalty or forfeiture, in any case nor to enforce a penal law except in case of a nuisance or unfair competition.

The State Housing Law does provide civil remedy to abate a nuisance. Section 17980 (Appendix F) Sec. 17981 and Sec. 17982 (Appendix G.) requires the enforcement agency give owner thirty days notice to abate the nuisance after which suit may be instituted. This procedure was not followed by the City; it proceeded under Section 203 (a) of its own Building Code—not to abate the nuisance but merely to enforce its own decree. The Appellate Court in discussing the unusual proceeding, stated: (Appendix B 23a)

> "What is a nuisance and whether the designation of a particular subject as a nuisance is within the legisla-

tive power are judicial questions . . . The legislature, however, usurps judicial power when it declares an act a nuisance when it is not so, and commands the court to enjoin it without proof that it will cause any injury or danger. (24a)

"A. The mere statement in a municipal building ordinance that any breach of enumerated safety condition is a nuisance is not binding upon the courts;

"B. The Superior Court in the county where the alleged condition exists is the proper forum to determine whether an alleged nuisance *per accidens* is a nuisance in fact (*Civ. Code,* §§ 3479, 3480; *Pen. Code* § 370):

"C. The court must not, independently of a determination of whether the alleged improper condition is in fact a nuisance, attempt to enforce by injunction the provisions of a city's building ordinances, which denounce certain described conditions as criminal offenses. In this latter situation, it is improper, generally speaking, for a city to attempt to enforce the criminal provisions of an ordinance of the type here involved through an injunction in the absence of an allegation and proof of the existence of a nuisance in fact. . ."

The Supreme Court of California, did not follow this view of the law. The Court held: (Appendix C 38a)

"Where the legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny its enforcement merely because in its independent judgment the danger caused by a violation was not sufficient. The function of the courts in such circumstances is limited to determining whether a statutory violation exists and whether the statute is constitutionally valid.

"It would be a usurpation of legislative power for a court to arbitrarily deny enforcement merely be-

cause in its independent judgment the danger caused by a violation was not sufficient, was not significant. (39a)

"Therefore, the City of Bakersfield has the power to define the statute, the standards by which court are to judge whether a nuisance exists and the trial court did not err in refusing to define this case on the basis of common law concepts or of the general provisions of Civil Code Section 3479."

By this finding, the Supreme Court held that the City need not proceed under Section 3469 of the State Code, thereby sanctioned the taking of petitioner's property before trial.

This holding sanctioned the right of the City to make its own determinations, on what is a nuisance upon its own declaration, and then abate it, without Judicial review or proceedings.

The decision of the Supreme Court of the State of California, would deny to the courts the power and authority to review legislative acts and would destroy the constitutional protection granted to each citizen under our constitution.

In the instant case, what do we have?

1. We have a building official clothed with the power under Section 203a of the Building Code to make determination as to what constitutes a nuisance to set his own standards with regard to what repairs or changes are necessary to correct this nuisance, with the power to seize the property if his determination is not followed and if, in his personal judgment, he deems it advisable, may even demolish this property; and post signs prohibiting the public from entering the premises, all without judicial review of any kind.

2. In the instant case, the Building Official acting under this power, ignored the provisions under Section 1309, which provided that in lieu of enclosing vertical openings and stairwells, that an automatic sprinkler system may be installed in the hotel, excluding therefrom, however, rooms, apartments and all accessory rooms adjacent thereto, established his own standards and demanded that the sprinkler system, if it was to be installed, would have to be installed in the entire hotel, including each and every room of the hotel, including the closets, bathrooms and all accessory rooms.

By this determination this Building Official increased the estimated costs of the alterations to the petitioner from $19,000.00 to $120,000.00, an increase of over $100,000.00, all without the benefit of a hearing or a trial being granted to the petitioner.

IV.

The combining of legislative, judicial and executive powers, all in one building official is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States guaranteeing due process of law to every citizen.

Seattle Trust Company v. *Roberge,* 278 U.S. 116. In this case, the owner of property desiring to build an old peoples' home on his premises made application to the Building Superintendent and the Building Superintendent denied the issuance of the permit on the grounds that to build a home on this property required the approval and consent of two-thirds of the owners of property within 400 feet of the proposed building. Without this consent, no permit would be granted.

The Court held, pages 121 and 122:

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond,* 226 U.S. 137, 143. *Browning* v. *Hooper,* 269 U.S. 396. . . . As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, . . ." (Page 123).

In the case of *O'Donoghue* v. *United States,* 289 U. S. 516, page 530:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments."

In the instant case, all departments were concentrated in one man; the Building Official. A right of trial by an independent judicial system is a prerogative of every citizen that should never be denied him. We wish to call

attention to remarks of Chief Justice Marshall, quoted in *O'Donoghue* v. *United States, Infra,* page 532:

> "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, the last degree important, that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary." In a very early period of our history, it was said, in words as true today as they were then, that "if they (the people) value and wish to preserve their Constitution, they ought never to surrender the independence of their judges." *Rawle on the Constitution,* 2d ed., 281.

The rights of every citizen under the Constitution of the United States should not be eroded under the guise and heading of police powers so that it becomes a mere nullity and the Court should be ever zealous to protect that right. The only forum under our constitutional government to protect the citizen's right against invasion and abuse by public authority are the courts and the judicial branches of our government. This was early established in the case of *Marbury* v. *Madison, decided in the Supreme Court of the United States,* 1803, 1 Cranch 137, 2d L. Ed. 60, In that case, it was held:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they

> are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it . . . , the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . ."

The very heart of constitutional protection to the citizen is the judicial authority of the government, and the statement by the Supreme Court that the Appellate Court exceeded its judicial authority when by its independent judgment guided by established precedent it held the action of the city building official unconstitutional. Every determination of whether an act is constitutional or unconstitutional must commence from somewhere, with some court, and it is the court at whatever level, that the matter of the validity of a legislative act, or the enforcement thereof, must be determined; whether the court be a single Judge or nine Justices. The difference is only in the finality of the decision. But the independent judgment of the Judge or the Justice to determine whether an act is constitutional or not lies strictly within their province, and any restraint upon the court to make such an independent judgment is a debasement of judicial authority to review legislative and administrative acts.

The respondent cites for authority to sustain the Supreme Court in reversing the Lower Court, the case of *Queenside Hills Realty Co., Inc.* v. *Saxl,* Commissioner of Housing and Buildings of the City of New York. 328 U.S. 80.

This case involved a small rooming house. The City of New York adopted an ordinance requiring modifications to be made on existing buildings, setting out what modifications were precisely required. The ordinance in question

was very similar in nature to the Bakersfield ordinance, Section 1309.

In that case the Court held, 328 U.S., page 82:

> "We are not concerned with the wisdom of this legislation or the need for it. Protection of the safety of persons is one of the traditional uses of the police powers of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fire-proof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system . . . The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here . . . It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum . . . But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

This case was decided on the section of the code wherein the legislature established express conditions and standards required of existing property owners. Under Section 1309, we also have by act of the legislature fixed standards and no contention is made or has ever been made that Section 1309 of the building code was void or unconstitutional. We are here not concerned with this section and the Appellate Court did not find this section unconstitutional. We concern ourselves here to the section 203 of the ordinance which is the cloth of authority under which the city acted, and which we contend grants legislative power to building officials, judicial power to building officials, executive power to the building official.

We are concerned here with the question as to whether the building official acting not under section 1309 but

acting under section 203(a), not guided by the standards set forth in section 1309, but by standards independently arrived at and then proceeded on the authority granted to the building official, under section 203(a), did condemn petitioner's property and by his condemnation proceeded to execute his own judgment and destroy it and came into court only after he had made the destruction of petitioner's property to ask the court to further assist him in the further destruction of petitioner's property. They did not come into court to try any of the issues as to whether the act of the building official was reasonable or lawful but came into court merely to obtain a writ of assistance by the injunctive decree of the court to compel the petitioner to vacate and close down his property. This is a far step from the *Queenside Hills* case and this is the step that this Court should not sanction.

The respondent in answer to the Petition for Supersedeas, points out in its answer, that the opinion of the Appellate Court, when reversed by the Supreme Court of that State, destroys all of its legal effect and is a mere nullity. We do not dispute this contention and the excerpts from the Opinion of the Appellate Court are not cited here as the law in this case, but are merely cited for its logic, and in view of the fact that it is supported by ample authority as accepted doctrine on the questions here presented, and that the Opinion of the Supreme Court of California, in reversing this Opinion, digressed from the well settled decisions of this Court and is, therefore, in conflict with them.

The Supreme Court of California in its Opinion stated that the petitioner was not cooperative with the Building Department, that for a period of ten years, they had attempted to obtain compliance from the petitioner. From the facts in this case, it will be noted that petitioner made every effort to comply with the ordinance, section 1309;

that he did have conferences with the Building Department and it was agreed in 1955, shortly after petitioner took over control of the hotel that petitioner was requested to correct his restaurant and kitchen; that he immediately undertook to make this correction; that he advised the Building Department that the cost to do this would exceed $30,000.00; that they allowed him three years so that he could pay off these costs at the rate of $10,000.00 per year; that after the three years, he would then install an additional fire escape; that in 1959, he proceeded to make this installation, but required the help of the Post Office Department in that the exit required, would be over the land owned by the Post Office Department; that he obtained this permission finally and then made the installation; that in 1960, he discussed the matter of the sprinkling system; that the Building Department imposed the excessive demands upon him regarding the extent to which the sprinkler system would have to be installed; that he could work out no other compliance with the City.

We wish to submit that every citizen who feels the oppression and the injustice of unlawful and arbitrary exercise of police authority and refuses to accede to these unjust and unlawful demands, becomes a defiant citizen, defiance to unjust laws and oppression is the right of every citizen.

V.

The judgment of the Trial Court was vague, uncertain and indefinite. The Appellate Court in its opinion, held (Appendix B 30a):

> "The plaintiff recovered judgment on its complaint as to all stories above the second floor", is an indeterminate order. The pleadings and evidence in the case show that the appendix to the building code provided for the doing of certain things but that the

> administrative officers of the City have directed something else as an allegedly valid alternative, namely, the installation of sprinklers in all rooms, closets, hallways, and the basement of the hotel. The judgment departs from the prayer of the complaint, which requests that the defendants be directed to install certain improvements and that they be given time to do so. The vague and uncertain form of the final judgment, in and of itself, would be sufficient to require the reversal of the decree. . ."

To ascertain what responsibilities were imposed on the petitioner by this order would require a complete study of all the pleadings and an analysis of them. This is an injunctive order and subjects petitioner to sanctions against his personal liberty and is in violation of his constitutional rights. 27 Cal. Jur. 2nd, Injunction Sec. 8, pp. 205-207.

CONCLUSION

In conclusion, for the reasons above stated, we contend that petitioner's constitutional rights and the protection of the law under the Constitution of the United States was denied him by the findings of the Trial Court and the Supreme Court of the State of California, and these judgments should be reversed.

Respectfully submitted,

JOSEPH J. KARLIN
188 W. Randolph St.
Chicago, Ill. 60601
CE 6-1331
Attorney for Petitioner

KARLIN, COE & SOLOMON
Of Counsel

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
In And For The County of Kern

CITY OF BAKERSFIELD, a municipal corporation, Plaintiff, vs. MILTON MILLER, individually, and as Trustee; et al, Defendants. MILTON MILLER, individually, and as Trustee; et al, Cross-Complainants, vs. CITY OF BAKERSFIELD, a municipal corporation, Cross-Defendant.	No. 81886 FINAL ORDER OF JUDGMENT (MODIFIED)

This cause came on regularly for trial on the 20th day of January, 1964, and was tried on that date and on the 21st and 22nd days of January, 1964, in Department 6 of the above-entitled court, before the Honorable John Locke, Judge Presiding, sitting without a jury, Kenneth W. Hoagland, City Attorney of Bakersfield, Raymond C. Clayton, Assistant City Attorney of Bakersfield, appearing for plaintiff and cross-defendant and Vizzard, Baker, Sullivan & McFarland, by James Vizzard and Richard M. Long, appearing as attorneys for the defendants and cross-complainants, and oral and documentary evidence having been introduced by the parties, and the court having considered the same and having read the arguments of counsel submitted by briefs, and the court having made its findings of fact and conclusions of law, now therefore.

It Is Ordered And Adjudged:

1. That plaintiff recover judgment on its complaint as to all stories above the second floor.

2. Upon compliance with the provisions of the Uniform Building Code respecting the Padre Hotel, or upon cessation of the use and operations of floors three to eight, inclusive, as a hotel or apartment use, the "Unsafe for Occupancy" signs shall be removed by city.

3. That defendants take nothing on the cross-complaint.

4. Costs of suit to plaintiff.

Dated: July 22, 1964.

John Locke, Judge

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIFTH APPELLATE DISTRICT
State of California

CITY OF BAKERSFIELD,
Municipal Corporation,
Plaintiff and Respondent,

v.

MILTON MILLER, Individually, and as Trustee of the Hotel Padre Trust, et al,
Defendants and Appellants.

MILTON MILLER, Individually, and as Trustee of the Hotel Padre Trust, et al,
Cross-complainants and Appellants,

v.

CITY OF BAKERSFIELD, a Municipal Corporation,
Cross-defendant and Respondent.

5 Civil No. 472

OPINION

(Filed—Sep 27 1965)

APPEAL from a judgment of the Superior Court of Kern County. John Locke, Judge.* Reversed.

Milton Miller in Propria Persona for himself, individually, and as Trustee of the Hotel Padre Trust, Defendant, Cross-Complainant, and Appellant.

No appearance for Bakersfield Hotel Company, a corporation, Defendant and Appellant.

Kenneth W. Hoagland, City Attorney of the City of Bakersfield, for Plaintiff, Cross-Defendant and Respondent.

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* Assigned by Chairman of the Judicial Council.

The principal questions to be determined on this appeal are:

1) Whether a municipal corporation, which does not allege in its complaint the existence of a nuisance but relies wholly upon the breach of the criminal provisions of a municipal building ordinance, is entitled to secure injunctive relief to enforce the ordinance?

2) Whether in the circumstances of this case there was a failure on the part of the city to observe due process of law by omitting to hold any formal hearing before posting at appellant's hotel doors signs reading "Do not enter-Unsafe for Occupancy?"

3) Whether the form of the decree in the case, aside from all other considerations, is so vague and uncertain as to require reversal?

The Hotel Padre located on the main street of the City of Bakersfield is a reinforced concrete and steel building, 8 stories high, built in 1929; admittedly it is a so-called "fireproof building," which was constructed before the adoption of the present city ordinance.

The appellant first purchased a minor interest in the hotel building in the year 1945. But in 1954 and 1955, he acquired the balance of the hotel stock for himself and the beneficiaries of a trust. As a factor inducing the major investment, he was influenced by a letter signed by Mr. J. A. Olsson, Chief Building Inspector of Bakersfield, addressed to Robert N. Eddy, the architect employed by the former owner of a majority interest, dated July 31, 1953, which read:

> "Dear Mr. Eddy:
>
> "This is to inform you that the structural rehabilitation work, of the subject building, has been accepted by the City Building Department as substantially complete in accordance with the plans and specifications, approved by this office on May 11, 1953. *This building is considered safe for occupancy.*
>
> "Very truly yours,
> J. A. Olsson
> Chief Building Inspector." (Italics added.)

On the 11th day of May, 1959, the City Council of Bakersfield enacted ordinance No. 1242, New Series, by which they adopted by reference the Uniform Building Code, 1958 edition, prepared by the International Conference of Building Officials at their 35th annual meeting on September 10-13, 1957; volumes 1 and 3, and the appendix thereto were included; the ordinance specified that the words "Building Official" as used in the code would mean "the duly appointed and acting Chief Building Inspector of the City of Bakersfield, his duly authorized representatives, or such person as may hereafter be authorized by law to perform the duties now being performed by that official in the City of Bakersfield"; section twelve of the ordinance made it unlawful "for any person, firm, or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure in the city, or cause the same to be done, contrary to or in violation of any of the provisions of said Uniform Building Code"; the ordinance further provided that anyone violating any of the provisions of the code should be deemed ". . . guilty of a misdemeanor, and . . . of a separate offense for each and every day or portion thereof during which any violation . . . is committed, continued, or permitted, . . ." and prescribed a penalty upon conviction of $500 for each offense, "or by imprisonment in the County Jail for a period of not more than six (6) months, or by both such fine and imprisonment."

Volume 1 of the Uniform Building Code, 1958 edition, is a printed book containing 364 pages, besides an extensive index; its preface states that the code was compiled from time to time by the Pacific Coast Building Officials Conference, the first edition having been published at the sixth annual business meeting held in Phoenix, Arizona, October 18-21, 1927; editions of the code, containing expansive changes, have been published in 1930, 1933, 1937, 1940, 1943, 1946, 1952, and 1955, besides the edition adopted in ordinance No. 1242, New Series. The oral argument developed that there is also a 1964 edition of the Uniform Building Code and probably others.

Confusion is perhaps increased, rather than diminished, by amended section 17922 of the Health and Safety Code (Stats. 1965, ch. 345, p. .....), which became law on September 17, 1965, and which provides with respect to rules and regulations ". . . adopted, amended, or repealed from time to time" pursuant to this chapter of the State Housing Act:

> "The rules and regulations adopted, amended, or repealed from time to time pursuant to this chapter shall include provisions imposing requirements * * * *reasonably consistent with recognized and accepted standards* contained in the Uniform Housing Code, * * * *1964* edition, the Uniform Building Code, * * * *1964* edition, as adopted by the International Conference of Building Officials, the Uniform Plumbing Code, * * * *1964* edition, as adopted by the Western Plumbing Officials Association, the minimum painting standards for home construction loans adopted by the Federal Housing Administration and the Department of Veterans Affairs, and the National Electrical Code, 1962 edition, as adopted by the National Fire Protection Association. The department shall adopt such other rules and regulations as it deems necessary to carry out the provisions of this part. In promulgating rules and regulations the department shall consider any amendments to the uniform codes referred to in this section. In promulgating rules and regulations the department shall also, consider, among other things, geographic, topographic and climatic conditions.
>
> "Local use zone requirements, local fire zones, building setback, side and rear yard requirements, and property line requirements are hereby specifically and entirely reserved to the local jurisdictions notwithstanding any requirements found or set forth in this part." (Italics show amendments; asterisks show deletions.)

At the time of the trial, numerous cities in California had adopted some edition of the Uniform Building Code in

much the same way that Bakersfield did. This is a helter-skelter way of passing an ordinance, and certainly it departs radically from the initial American method of enacting a municipal law. The complexity and the varied requirements of modern life doubtless require the adoption of some such method by part-time professional lawmakers, but the existence of this method of conducting municipal affairs, involving the imposition of heavy penalties and the destruction of business enterprises and costly buildings, stresses the necessity that courts give close attention to the thrust of such enactments vis-a-vis the constitutional rights of individuals. The adoption, by simple reference, of a complicated "code" of several volumes regulating the details of an important branch of our daily affairs endangers the rights of property which constitute part of our basic law. (*Agnew* v. *City of Culver City,* 147 Cal. App. 2d 144, 154-155.)

The Constitution of the United States (amends. V and XIV) and the Constitution of California, article I, sections 1 and 14, establish that the ownership of property and the peaceable conduct of business affairs are fundamental rights to be enjoyed by all citizens; the right to maintain a legitimate business is a property right, which cannot be taken away, except under general and well-understood principles such as the police power. In *Miller* v. *Board of Public Works,* 195 Cal. 477, 484, it is said:

> "The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. (*Hadacheck* v. *Sebastian,* 239 U.S. 394 [Ann. Cas. 1917B, 927, 60 L.Ed. 348, 36 Sup. Ct. Rep. 143]; *District of Columbia* v. *Brooke,* 214 U.S. 138, 149 [53 L.Ed. 941, 29 Sup. Ct. Rep. 560, see, also, Rose's U. S. Notes].) It is not, however illimitable and the marking and measuring of the extent of its exercise and application is determined by a consideration of

the question of whether or not any invocation of that power, in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals (*Hannibal etc R.R. Co.* v. *Husen,* 95 U.S. 465, 470 471 [24 L.Ed 527]; *Boston Beer Co.* v. *Massachusetts,* 97 U.S. 25 [24 L.Ed. 989]), or general welfare of the people of a community. (*Chicago, B & Q. Ry. Co.* v. *Illinois,* 200 U.S. 561, 592 [4 Ann. Cas. 1175, 50 L.Ed. 596, 26 Sup. Ct. Rep. 341, see, also, Rose's U.S. Notes].)

"In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public. That is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: 'What was a reasonable exercise of this power, in the days of our fathers may to-day seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is today accepted as a most proper and reasonable exercise thereof.' (*Streich* v. *Board of Education,* 34 S.D. 169 [Ann. Cas. 1917A, 760, L.R.A. 1915A, 632, 147 N.W. 779].)

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for

the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' (*Chicago, B. & Q. R. Co.* v. *Illinois, supra.*) Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.' (*Streich* v. *Board of Education, supra*), *and* that power 'may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'"

(See also *Zahn* v. *Board of Public Works,* 195 Cal. 497; *People* v. *Johnson,* 129 Cal. App. 2d 1; *City of Los Angeles* v. *Gage,* 127 Cal. App. 2d 442; *City of Stockton* v. *Frisbie & Latta,* 93 Cal. App. 277; *Thille* v. *Board of Public Works,* 82 Cal. App. 187.)

The police power does not *ipso facto* give a right to the state or to a municipal corporation to do anything it pleases. If an attempted law or regulation does not bear a substantial relation to the public health, safety, morals, or general welfare, or is arbitrary, or unreasonable, its attempted execution will be stricken down. (*Washington* v. *Roberge,* 278 U.S. 116; *Washington* v. *Fairchild,* 224 U.S. 510; *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Ganley* v. *Claeys,* 2 Cal. 2d 266, 268-269; *In re Junqua,* 10 Cal. App. 602, 605-607; *Bank of America* v. *Town of Atherton,* 60 Cal. App. 2d 268; *Morris* v. *City of Los Angeles,* 116 Cal. App. 2d 856, 861; *State* v. *Wittles,* 136 N.W. 883; 39 Am. Jur., Nuisance, § 13, p. 294; *Gunderson* v. *Anderson,* 251 N.W. 515, 516; 16 C.J.S., Constitutional Law, §§ 195-198, pp. 938-973.)

In *Skalko* v. *City of Sunnyvale,* 14 Cal. 2d 213, 215-216, the Supreme Court said, with respect to the police power.

> ". . . where the exercise of that power results in consequences which are oppressive and unreasonable, courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property. In other words, the governmental power is not unlimited, and a regulation of the use of property must rest upon a reasonable exercise of the police power. (*Nectow* v. *Cambridge,* 277 U.S. 183 [48 Sup Ct. 447, 72 L.Ed. 842].) Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. (*Washington* v. *Roberge,* 278 U.S. 116 [49 Sup. Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654].)"

And in *Anderson* v. *Great Republic L. Ins. Co.,* 41 Cal. App. 2d 181, 190, the applicable general principle is stated as follows:

> "Police power can never be used as an excuse for unreasonable, arbitrary action or improper discrimination."

In *Mattei* v. *Hecke,* 99 Cal. App. 747, at page 753 the same principle is thus treated:

> "In order to justify the state in interposing its authority the interests of the public generally must require such interference and such interposing of authority must be reasonably necessary for the accomplishment of the purpose, and where the police power is exerted to regulate a lawful business it is always a judicial question whether the regulation is a valid exercise of such power (*In re Smith,* 143 Cal. 368 [77 Pac. 180]). 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by fundamental law it is

> the duty of the courts to so adjudge and thereby give effect to the constitution.' (*In re Dees*, 46 Cal. App. 656, 660 [189 Pac. 1050, 1052])."

Irrigation Dist. v. *Mt. Shasta Power Corp.*, 202 Cal. 56 68 quotes, with approval from a foreign jurisdiction, as follows:

> "In *Stone* v. *Kendall* (Tex. Civ. App.), 268 S.W. 759, the court said" 'Since the right of a citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked to prohibit a particular use of private property, unless such use reasonably endangers or threatens the public health, safety, comfort, or welfare.'"

While the mere fact of cost or loss to the owners of a building subject to a building code cannot of itself deprive a municipality of the right to exercise the police power, it nevertheless is a factor which the appropriate court may consider in determining whether a given state of affairs is a nuisance in fact which should be abated. In the case of *Adamec* v. *Post*, 273 N.Y. 250, 7 N.E. 2d 120, 122-123, this situation is thus discussed:

> "Conformity to such standards may cause additional expense to owners of land and result in increased rentals and thus cause incidental hardship to tenants who have small incomes. Nevertheless the Legislature has power to prohibit the use of land for the erection of buildings, to be used for housing, which provide accommodations below such standards. The power of the State to place reasonable restrictions upon the use of property for the promotion of the general welfare is no longer subject to challenge and regulations governing the erection or use of buildings as multiple dwellings which are reasonably calculated to safeguard the public health and safety constitute a proper exercise of that power. Cf. *Adler* v. *Deegan*, 251 N.Y. 467, 167 N.E. 705.

"This court has said that there is no difference of principle but 'only of circumstance' between a legislative enactment of 'conditions upon complying with which the owner might be permitted to erect a structure within the limits of a city or village or for certain purposes, and the enactment of provisions which would necessitate the alteration of structures already in existence.' In both cases the enactment is an attempted exercise of the police power 'in order to secure the general comfort and health of the public' and in both cases the use of his property by the owner is 'circumscribed and limited, what might otherwise be called his rights are plainly interfered with, and the justification therefor can only be found in this police power.' *Health Department of City of New York* v. *Rector, etc., of Trinity Church,* 145 N.Y. 32, 45, 39 N.E. 833, 837, 27 L.R.A. 710, 45 Am. St. Rep. 579.

"Difference 'of circumstance' may, nevertheless, be an important factor in determining whether a particular regulation is reasonable. A small additional cost in erecting a new building in conformity with a regulation calculated to 'secure the general comfort and health of the public' even in a matter, perhaps, not of vital importance, may be reasonably justified by the result to be attained, while the cost of alteration of an old building to conform to such a regulation may be too great to be reasonably required for a doubtful or slight public benefit. Then, too, costly alterations may be economically impractical for old buildings, perhaps deteriorated by years of use, perhaps obsolescent, perhaps in neighborhoods no longer suitable for dwellings. In such case a requirement of such alterations may result in discontinuance of the use of such buildings with consequent loss of revenue to the owner of the building, and perhaps hardship to the tenants who must move out and find other quarters, where, in return for better dwellings, they may be compelled to pay higher rents.

"These are matters which are primarily the concern of the Legislature and must reasonably affect its judgment as to what differentiation should be made between regulations for the construction of buildings presently to be erected and provisions necessitating alterations in old buildings constructed in accordance with standards formerly approved but now discarded as inadequate. Even so, as the court pointed out in *Health Department of City of New York* v. *Rector, etc., of Trinity Church, supra,* 145 N.Y. 32, at page 41, 39 N.E. 833, 836, 27 L.R.A. 710, 45 Am. St. Rep. 579, the discretion of the Legislature is not absolute. 'The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public.' In the same case the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in *Rideout* v. *Knox,* 148 Mass. 368, 19 N.E. 390, 2 L.R.A. 81, 12 Am. St. Rep. 560: 'It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain.'"

Unquestionably, the burden would be placed upon Mr. Miller by effecting the changes in the Padre Hotel ordered by the city's building inspector would in amount be confiscatory. Mr. Miller, as owner, expressed on the witness stand his view that the reasonable market value of the

hotel building at the time of trial was $100,000. The witness Hoerner, an architect and structural engineer who had studied the building, testified that a conservative estimate of the cost of necessary remodeling required by the employees of the city would be $68,129, and that this would cover only the demands made and would not be acceptable as a proper finish of the building from the standpoint of economic utility. He further testified that if the defendants had accepted the alternative of a sprinkling system, its minimum cost would be $54,600; and to restore the economic value of the hotel by new ceilings, relocation of light fixtures and other necessary work, the cost would run to $120,690. Mr. Miller testified that if the transoms in the building were closed it would be necessary to expend $100,000, or more, to install a new airconditioning system rather than to retain the present evaporative type, because the circulation of the air would be reduced to a point where it would be unbearable to occupy the rooms through the summer months. He pointed out that the hotel was losing almost $30,000 a year, and was just about paying taxes and interest charges. The witness, Hoerner, testified that the overall cost of the installation of a central airconditioning system would be $213,000.

With these factors in mind, let us turn to a close analysis of the pleadings. Just what is it that the city is trying to do in this particular case? Is there an allegation of the existence of a nuisance in fact? The answer is positively "No." The complaint and answer, the pretrial order, and the findings all demonstrate that the suit is based upon the admitted failure of the defendants to carry out all of the suggested changes made by the city building inspector.

The complaint does not purport to be a suit to abate a nuisance as is contemplated by the sections of the State Housing Law incorporated in the Health & Safety Code. Section 17910, et seq, of the Health & Safety Code provide that if any building is maintained in violation of any provision of the code, ". . . or if a nuisance exists in any

building or upon the lot on which it is situated, the enforcement agency shall after 30 days' notice to abate such nuisance institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance" (Health & Saf. Code, § 17980); the appropriate court, namely, the superior court, may respond to the action of an enforcement agency by granting the relief sought in the proceeding, and may make any order for which application is made pursuant to sections 17980 to 17995, inclusive, including temporary relief, and an order to remove the violation or abate the nuisance (§§ 17981, 17982, and 17983, Health & Saf. Code).

The complaint, filed September 1, 1961, relies for an injunction wholly on alleged breaches by the Padre Hotel of provisions contained in the appendix to volume 1 of the 1958 edition of the Uniform Building Code. Paragraphs VII to XII of the complaint allege that the interior stairways of the hotel are not enclosed with walls of not less than one-hour fire resistive construction as required by section 1309 (f) of the Uniform Building Code; that the fire escapes on the building do not extend to the ground, nor are they provided with counterbalanced stairs as required by section 1309 (h); that the elevator shafts and duct shafts are not enclosed as required by section 1309 (k); that the hotel contains transoms and openings other than doors which are not fixed closed and covered with a minimum of three-fourths-inch plywood, as required by section 1309 (i); that the building contains a boiler room or heater room in the basement which is not separated from the rest of the building by a four-hour fire resistive occupancy separation as required by section 1309 (l); and that the hotel contains doorway exits or changes of direction of corridors that are not marked with well-lighted exit signs in letters at least five inches high, as required by section 1309 (j) of the appendix of the Uniform Building Code. The complaint prays that the court determine that the Padre Hotel is an unsafe building, that the defendants be ordered to commence the correction of said violations, within a reasonable time, that the defend-

ants be ordered to vacate the hotel, and to cause all tenants to leave the premises until the violations are corrected. There is no allegation that the building as conducted by the defendants is a nuisance in fact.

The answer admits that the defendants have not conformed with all the requirements of the appendix but denies the other major allegations of the complaint, and it sets up affirmative defenses as follows:

That, contrary to the Constitutions of the United States and of the State of California, the effect of the ordinance adopting the Uniform Business Code will be to deprive the defendants of their property rights without due process of law and the equal protection of the laws; that the ordinance is, therefore, "oppressively discriminatory and unreasonable as against said answering defendants . . . that it is void and unenforceable; and places an unequal burden upon said defendants and is grossly oppressive, unreasonable and unlawful, and discriminates against said answering defendants . . . in the operation of their hotel business." It is further alleged in the first special defense that the ordinance discriminates against defendants in favor of the owners of 13 other hotel buildings; that the work on the Padre Hotel demanded of defendants would ". . . require expenditures of such extent as to be confiscatory in effect," and "plaintiff is proceeding under an ex post facto law"; that the plaintiff requires closures of stairways upon the property of defendants, which are not in fact necessary for other hotels and rooming houses which would be subject to said ordinances; that there is further an attempt to discriminate in that the classification of hotels and the required construction thereof differ materially and unfairly, and that plaintiff seeks an adjudication that the building constitutes a public nuisance without a trial or judicial determination of such fact, and thus is a denial of due process of law; that the ordinance provides for a board of appeals and that there is granted to such board an unconstitutional delegation of legislative and judicial functions to the extent that said board may vary the interpretation of the code, and said ordinance

is lacking in specific and clear standards as to building requirements.

A second affirmative defense is set forth on behalf of Mr. Miller to the effect that the ordinance is unconstitutional and void insofar as it affects the defendants in that the provisions thereof have already been incorporated in the laws of the State of California in such detail as to exclude further action for legislation thereon by plaintiff, such provisions being set out in the Health & Safety Code; that the provisions of state laws are without the intent that they shall be applicable to apartment houses or hotels constructed before the enactment of the applicable provisions of the Health & Safety Code; that the requirement of automatic sprinkler systems in boiler rooms are exclusively controlled by the provisions of the California Health & Safety Code in that the state law provided that sprinkler systems should not be required in basements containing less than 1800 square feet, and that boiler rooms, central heating rooms, and bank vaults were excluded therefrom, and in said respect there is no compartment or room in the Padre Hotel of more than 1800 square feet; it further claimed by reason of the enactment of sections in the Health & Safety Code, that California has passed legislation pertaining to fire protection in hotels and apartments to the exclusion of, and in conflict with, any legislation by plaintiff, and that, therefore, ordinance No. 1242 of Bakersfield is unconstitutional and void by reason of the provisions of article XI, section 11 of the Constitution of California.

A third affirmative defense is that if the ordinance is found to be valid, contrary to appellant's contention, a mandatory injunction as requested by the plaintiff would be inequitable in that it could not properly apply to any floor of the hotel below the second.

The pretrial order does not include as an issue the question whether the hotel constitutes a nuisance in fact; the findings follow in form the allegations of the complaint, saying that owners and managers of the Padre Hotel have failed to comply with the specific provisions

of the appendix to the 1958 edition of the Uniform Building Code. The findings continue by holding generally in broad conclusion that there has been no differentiation in connection with the insistence of the local authorities that the ordinance relative to fire safety be obeyed by all persons owning hotels. The conclusions of law are to the same effect; No. 9 of the conclusions of law is "that the Padre Hotel *in the matters complained of* in the complaint is a public nuisance." (Italics added.) Obviously, the allegations of the complaint relative to breaches of the rules contained in the Uniform Building Code appendix are referred to.

The final judgment provides as follows:

"It Is Ordered And Adjudged:

"1. That plaintiff recover judgment on its complaint as to all stories above the second floor.

"2. Upon compliance with the provisions of the Uniform Building Code respecting the Padre Hotel, or upon cessation of the use and operations of floors three to eight, inclusive, as a hotel or apartment use, the "Unsafe for Occupancy" signs shall be removed by city.

"3. That defendants take nothing on the cross-complaint.

"4. Costs of suit to plaintiff."

The case presents an essential conflict between the rights of individuals as property owners and the necessities of the community by reason of the growth of the state and the increased complexity of daily life. There can be no doubt that the organized community must face the changed conditions of living, and that management must be provided for the diverse and complicated affairs of the community. This is what is attempted by the enactment of ordinances throughout the state setting up the several volumes of the Uniform Building Code. The chief desideratum of such an ordinance obviously is that new buildings in the community should conform to modern

methods of construction, and that to a somewhat limited extent old buildings should be remedied in conformity with the latest construction methods. However, there must be due regard, within reasonable limits, for the rights of individuals who have either built or bought older buildings. Repairs made on such buildings should reasonably conform with the latest methods of construction and maintenance, but to require all buildings to meet standards which are decidedly changed from earlier standards would often be to cause a forfeiture of the investment involved and the practical destruction of such older buildings even though they did not constitute a nuisance in fact. There must be a common-sense weighing of the conveniences, and such meticulous requirements for improvement cannot properly be enforced, in the absence of reasonable necessity, so as virtually to rob the owners of their property. (*Matter of Stoltenberg,* 165 Cal. 789, 792-794.) The Uniform Building Code itself shows the clash of these differing requirements as applied to permits for new construction, and to the continuance of old buildings. In *Markwalder* v. *Leonhard,* 152 Cal. App. 2d 254, 258, it is said:

> "It has been held as a general rule that building code provisions are not retroactive."

(See also *Schumann* v. *C. R. Engineering Co.,* 187 Cal. App. 2d 309, 314.) The main portion of the code purports to apply to all buildings in the city, irrespective of whether they have conformed with all previous building laws at the time they were constructed. In the appendix, however, it is stated that the requirements apply only to old buildings.

In the Uniform Building Code, it is said that failure to observe the standards set up in the code would constitute the buildings public nuisances. However, the mere statement in a city's building ordinance that some condition is a nuisance does not necessarily make it a nuisance as a matter of law, binding on the courts.

It is true generally that a legislature or the council of a municipality (37 Am. Jur., Municipal Corporations,

§ 292, pp. 933-934) may prescribe what is a nuisance (66 C.J.C., Nuisances, § 7, p. 736, et seq; *People* v. *Lim*, 18 Cal. 2d 872; *People* v. *K. Hovden Co.*, 215 Cal. 54). But a legislative body cannot create a nuisance by *fiat*, if it is not a nuisance in fact.

Conducting a hotel in a "fireproof building" is not a nuisance per se; but, of course, such a building may become a nuisance in fact by reason of its locality, surroundings, dilapidation, or the manner in which it is operated. As to such things ". . . a municipal corporation has no power conclusively to declare them to be nuisances, but can only declare such of them to be nuisances as are so factually, because general authority to define and abate nuisances does not empower a municipality to declare that to be a nuisance which is not a nuisance in fact, or which is not a nuisance per se does not come within the common-law or a statutory definition of a nuisance." (37 Am.Jur., Municipal Corporations, § 293, pp. 936-937.)

In discussing an ordinance of the City and County of San Francisco relative to the burial of dead persons, which recites that such burials, within the City and County of San Francisco, are ". . . dangerous to life and detrimental to public health," the Supreme Court had the following to say in *Laurel Hill Cemetery* v. *City and County of San Francisco*, 152 Cal. 464, 470-471:

> "Such ordinances must, of course, bear a rational relation to the object sought to be attained. They may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. (*Holden* v. *Hardy*, 169 U.S. 366, [18 Sup.Ct. 383]; *In re Smith*, 143 Cal. 368, [77 Pac. 180].) 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what

is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' (*Lawton* v. *Steele,* 152 U.S. 133, [14 Sup.Ct. 499].)"

It is further said in 37 American Jurisprudence, Municipal Corporations, section 293, at pages 937-938:

> "There has been a tendency in municipal councils to imagine that by declaring a certain use of property to be a public nuisance all discussion is foreclosed, and by virtue of such declaration, the power of the municipality to suppress such use is unquestionable. Such a notion, however, rests upon a failure to distinguish between the different classes of subjects which may under some conditions fall within the category of nuisances."

In *Des Plaines* v. *Poyer,* 123 Ill. 348, 14 N.E. 677, it is pointed out that even though a municipality is given the power under a general act to declare what shall be a nuisance, it cannot declare a thing to be a nuisance which is not such in fact.

In *Olson* v. *City of Platteville,* 251 N.W. 245, 249, it was held that a court could not issue an injunction to uphold an ordinance of a city with regard to a moving picture theater when it was not in fact a nuisance; the opinion states:

> "The cases relied upon by respondents, where the question of the right to an injunction by public authorities to enforce ordinances was involved, require the establishment of the element of nuisance as a necessary adjunct to the granting of such relief. This rule is appreciated by the learned counsel for the respondent, for he argues vigorously in support of the conclusion of the trial court that the building is within the fire limits of the city of Platteville, and by reason of its construction and present condition, its operation as a theater in viola-

tion of law is a nuisance. But it does not have the character of a nuisance per se. In *President, etc., of Village of Waupun* v. *Moore,* 34 Wis. 450, 17 Am.Rep. 446, an ordinance prohibited the erection of wooden buildings within certain specified limits and imposed a penalty for its violation. In denying the injunction it was there held that, because the building was not a nuisance, equity would not lend its aid to enforce by injunction the ordinances of a municipal corporation. The general rule is that unless an act is shown to be a nuisance per se, an injunction to aid in the enforcement of a city ordinance will not issue. In *City of Janesville* v. *Carpenter,* 77 Wis. 288, 46 N.W. 128, 8 L.R.A. 808, 20 Am.St. Rep. 123, in an action brought by the city to restrain the erection of a building in violation of a city ordinance, an injunction was also denied. The court there followed the same rule laid down in the *Waupun* case. In *Holzbauer* v. *Ritter,* 184 Wis. 35, 198 N.W. 852, 853, where the principle was discussed, the court, in distinguishing the *Waupun* and *Janesville* cases from the facts in that case, said: 'We do not think that these decisions go farther than to hold that a municipal corporation may not seek equitable relief to enforce its own ordinances. They have a perfectly adequate remedy at law by bringing actions to enforce the penalties prescribed.' "

(See *People* v. *City of Chicago,* 103 N.E. 609.)

The foregoing cases stand for the proposition that the mere fact that a thing is done in violation of the terms of a municipal building ordinance does not make it a nuisance per se. (39 Am.Jur., Nuisances, § 11, p. 292.) Whether a condition or thing, which may or may not be a nuisance, is in fact a nuisance, if controverted, must be settled in the appropriate court as one of fact. (39 Am.Jur., Nuisances, § 11, p. 291, note 13; *Jezowski* v. *City of Reno,* 71 Nev. 233, 286 P.2d 257, 52 A.L.R. 2d 1127; 62 A.L.R. 2d 123.)

In the treatment of the subject "Nuisances" in 39 American Jurisprudence, section 13 at pages 294 and 295, the law relative to that subject in the light of constitutional principles is thus set forth:

> "Limitations on Power; Judicial Review.—The power of the legislature over nuisances is subject to constitutional limitations. It is confined to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. It cannot be made a cloak for confiscation or for withdrawing property from the protection of the law. The legislature has no power arbitrarily or capriciously to declare any or every act a nuisance, and cannot enlarge its power over property or pursuits by declaring them nuisances; nor can it by mere declaration make that a nuisance which is not so in fact and thereby destroy or prevent a lawful use of property. But statutes of this kind are not within the constitutional inhibition against impairing contract obligations, since parties who contract with respect to matters within the police power of the state do so subject to the exercise of that power whenever the legislature chooses to exercise it. The abatement of a nuisance is not a cruel and unusual punishment, and it is not essential that the legislative body prior to acting give a hearing on the matter.
>
> "The action of the legislature in this regard is subject to review by the courts. What is a nuisance and whether the designation of a particular subject as a nuisance is within the legislative power are judicial questions. But a good deal must be left to the discretion of the legislature, and if the object to be accomplished is condusive to the public interests, it may exercise a large liberty of choice in the means employed, and only in extreme cases will the courts go behind the legislative determination. The legislature, however, usurps judicial power when it declares an act a nuisance when it is not so, and commands the court to enjoin it without proof that it will cause any injury or danger."

(See also *People* v. *Jones*, 69 N.E. 2d 522; *City of Houston* v. *Lurie*, 224 S.W. 2d 871; 14 A.L.R. 2d 61; *Vermont Salvage Corp.* v. *St. Johnsbury*, 34 A. 2d 188; 78 A.L.R. 2d 1317, 1328; *Smith* v. *Costello*, 290 P. 2d 742, 56 A.L.R. 2d 1020.)

As applied to the present case, we draw the following conclusions from the applicable law:

(A) The mere statement in a municipal building ordinance that any breach of enumerated safety condition is a nuisance is not binding upon the courts;

(B) The superior court in the county where the alleged condition exists is the proper forum to determine whether an alleged nuisance *per accidens* is a nuisance in fact (Civ. Code, § 3479, 3480; Pen. Code, § 370);

(C) The court must not, independently of a determination of whether the alleged improper condition is in fact a nuisance, attempt to enforce by injunction the provisions of a city's building ordinance, which denounce certain described conditions as criminal offenses. In this latter situation, it is improper, generally speaking, for a city to attempt to enforce the criminal provisions of an ordinance of the type here involved through an injunction in the absence of an allegation and proof of the existence of a nuisance in fact. All of the situations that are forbidden in the ordinance purportedly constitute breaches of the criminal law, and presumably they may be prosecuted as such. In *Monterey Club* v. *Superior Court*, 48 Cal.App.2d 131, 146-147, it is pointed out that, as said in the earlier Supreme Court case of *People* v. *Lim, supra*, 18 Cal.2d 872, 879:

> " 'Where the legislature has felt that the summary power of equity was required to control activity contrary to public policy, it has enacted statutes specifying that such activity constitutes a public nuisance which may be enjoined in an action brought on behalf of the state . . ." . . . but it is not the province of the courts to ordain such jurisdiction for themselves." '"

In the *Monterey Club* opinion at page 146, the following is stated:

> "A court of equity will not undertake to enforce the criminal law. (*Weis* v. *Superior Court,* 30 Cal. App. 730 [159 Pac. 464]; *People* v. *Seccombe,* 103 Cal.App. 306, 312, 313 [284 Pac. 725].) And the reason for such a rule under our form of government is clear, because as pointed out by the Supreme Court in the *Lim* case, *supra,* an individual accused of crime by way of prohibition or injunction would not only be required to prove his own innocence, but as well would be deprived of the right of trial by jury, the protection of the presumption of innocence and the doctrine of reasonable doubt; and in the final analysis, upon an order to show cause would be forced to become a witness against himself."

It was not alleged in the complaint in this action that the maintenance of the Padre Hotel constituted a public nuisance; the basic allegations were to the effect that certain requirements of the ordinance containing criminal sanctions were not observed. The two California cases chiefly relied upon by respondent both involve public nuisances in fact. (*Knapp* v. *City of Newport Beach,* 186 Cal.App.2d 669; *Perepletchikoff* v. *City of Los Angeles,* 174 Cal.App.2d 697.)

The City of Bakersfield had a right to pass the ordinance in question and to enforce it with respect to the issuance of permits for the construction of new buildings; it also has the right to seek to enforce the rules contained in the ordinance by criminal preceedings, if they have been disobeyed. But it has no right, in the absence of allegations and proof of a nuisance in fact, to get an injunction to close the hotel business or destroy the property in question, in whole or in part. (Civ. Code, § 3369, subd. 1; *People* v. *Brophy,* 49 Cal.App.2d 15; *People* v. *Seccombe,* 103 Cal.App. 306; *Herald* v. *Glendale Lodge No. 1289,* 46 Cal.App. 325; *Nathan H. Schur, Inc.*

v. *City of Santa Monica,* 47 Cal.2d 11; *Perrin* v. *Mountain View Mausoleum Assn.,* 206 Cal. 669; *International etc. Workers* v. *Landowitz,* 20 Cal.2d 418; *Sullivan* v. *San Francisco Gas etc. Co.,* 148 Cal. 368.)

It is obvious, also, that upon the hearing of a case to abate a nuisance in fact the court would have to determine whether the subject matter which the city sought to cover in the ordinance has been, in fact, taken under the exclusive control of the state. The provision of law (Health & Saf. Code, § 17951) permitting a municipality to enact building laws which impose restrictions which are equal to, or greater than, those adopted by the state, would necessarily present a question of law for the trial court to determine, namely, whether there was any right on the part of the municipality to legislate with respect to the particular subject under investigation. The state has greatly extended the area within which it purports to control building laws through title 8, sections 16216-17926, of the California Administrative Code, which cover a great area, and which may make inapplicable certain provisions of the Uniform Building Code as adopted by the Bakersfield ordinance.

In the cross-complaint filed by leave of court, the appellant attacked the action of the city in posting on the hotel premises, without a previous formal hearing, a notice that the hotel was unsafe for occupancy and directing the public to keep out of the building. The essential question on this phase of the case is whether the city's administrative officers, under the circumstances shown by the record, had the right, without a previous formal hearing, so to designate the entire premises.

Section 203 (a) of the 1958 Uniform Building Code declares:

> "All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to

> existing use constitute a hazard to safety or health, or public welfare, . . . as specified in this Code or any other effective ordinance, are, for the purpose of this Section, unsafe buildings."

The section goes on to state that such an "unsafe" building is a public nuisance, that all such buildings shall be abated with, or without, a public trial and that the appropriate city building official may place "DO NOT ENTER—UNSAFE TO OCCUPY" signs on the entrance doors to any such building.

The appellant correctly points out that if, in a case like this, the city administrative officers can determine for themselves the questions involved without a formal hearing, then, through whim or caprice, or honest but mistaken zeal, they can force almost any hotel or apartment owner out of business.

We agree with the position of the appellant that the Fourteenth Amendment to the United States Constitution requires, as a normal preliminary to the posting of such signs in the circumstances developed by the present record, a hearing and a consequent finding on the evidence that the premises are in fact unsafe.

As is said in *Powell* v. *State of Alabama,* 287 U.S. 45, an opportunity for hearing is one of the essential elements of due process. It cannot be said that an extreme emergency existed in the present case, such as would under the heading of "urgent necessity" permit the omission of a proper hearing in the circumstances.

Morris Plan Co. v. *State of California,* 73 Cal.App.2d 415, 420, holds:

> "The due process clause in its procedural sense is a guarantee that before one may be deprived of property, a hearing must be had before a judicial or quasi judicial body according to established rules of law."

In 11 California Jurisprudence, Second Edition, Constitutional Law, section 313, page 788, this principle is thus stated:

> "To constitute due process, a legal proceeding must give the parties adequate means of asserting their rights. To this end, due process requires that a tribunal that assumes to determine the rights of parties shall have jurisdiction over the parties and over the subject matter of the proceeding, and that the parties shall be given notice and an opportunity for hearing, before any order or judgment in the proceedings can be made by which they will be deprived of life, liberty, or property."

In *People* v. *Broad,* 216 Cal. 1, 3, it is said:

> "Even where, as here, the statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title of the state is not perfected until there has been a judicial determination. That judicial determination cannot be in an action in which the owner is not a party."

And on pages 4 and 5, the discussion is thus enlarged:

> "A common-law or judicial forfeiture does not operate or take effect until by a proper judgment in a suit instituted for that purpose the rights of the state or government have been established. But in the case of a statutory or legislative forfeiture the forfeiture takes place on the commission of the offense. But after the commission of the offense resulting in the forfeiture the title of the state is inchoate or incomplete until such time as there is a judicial determination of the forfeiture. Neither the legislature nor the courts can dispense with the constitutional requirement of a notice and hearing. (25 Cal.Jur. 1175, sec. 65 et seq.) The only important difference between the two types of forfeiture is

that in the case of the common-law or judicial forfeiture the rights of the state date from the judicial determination; while in the case of a legislative or stautory forfeiture the rights of the state, after such judicial determination, date back to the time of the offense, and cut off even the rights of a *bona fide* purchaser.

"The point that a judicial determination is necessary in the case of a statutory or legislative forfeiture is well settled, both by the decisions of this court and by the decisions of the United States Supreme Court. In *United States* v. *Stowell,* 133 U.S. 1, at page 17 [33 L.Ed. 555, 10 Sup. Ct. Rep. 244], it is stated: 'By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation*; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; *and the condemnation, when obtained, relates back to that time,* and avoids all intermediate sales and alienations, even to purchasers in good faith.' In *Traffic Truck Sales Co.* v. *Justice's Court,* 192 Cal. 377, at page 383 [220 Pac. 306], it is stated: 'When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed. [Citations.] The adjudicated cases establish the rule beyond all doubt that the forfeiture becomes absolute on the commission of the prohibited acts, and that the title from that moment vests in the state. [Citation.] In case a prosecution of the offender ensues, *and a decree of condemnation follows in a court of competent jurisdiction the decree relates back to the date of the wrongful acts alleged and proved at the trial*

or in the hearing of the cause. [Citation.] *But the law requires proceedings to be instituted* for the purpose of ascertaining the facts of the forfeiture [Citation], *and the inchoate title of the state to the goods forfeited is not fully consummated until after judicial condemnation has been had.* [Citations.]' "

While it is true that there are instances when overpowering urgency necessitates this type of rapid action by building officials, without a hearing, there should normally be a formal hearing where, as here, the building officials have delayed action for over ten years.

If it is alleged that the questioned building is, in fact, a nuisance which should be abated, the necessary judicial hearing for authorization to post the premises could take place in such a suit on an application for a preliminary injunction. At the very least, in the situation developed by the evidence, the city officials should not have acted as they did without a formal hearing on notice at which the hotel owners should have had the opportunity to attempt to meet the charges, to cross-examine witnesses, and to put on a case.

But, if section 203 of the ordinance is left wholly in the hands of city officers to enforce without a proper preliminary hearing, it delegates to administrative action the exercise of judicial, or semi-judicial, functions without the protection inherent in constitutional safeguards. The decree in the case should have so held.

Entirely apart from the foregoing considerations, the appellant correctly points out that the final judgment is so vague, uncertain, and indefinite as to offend the principles of pleading and practice applicable to the injunctive process (27 Cal.Jur. 2d, Injunctions, § 81, pp. 205-207.) The conclusion "That plaintiff recover judgment on its complaint as to all stories above the second floor" is an indeterminate order. The pleadings and evidence in the case show that the appendix to the building code provides for the doing of certain things

but that the administrative officers of the city have directed something else as an allegedly valid alternative, namely, the installation of sprinklers in all rooms, closets, hallways and the basement of the hotel. The judgment departs from the prayer of the complaint, which requests that the defendants be directed to install certain improvements and that they be given time to do so. The vague and uncertain form of the final judgment, in and of itself, would be sufficient to require the reversal of the decree and the conduct of further proceedings in the case, if other elements in the suit had been proper.

The remedy on appeal, however, must be broader than any mere reformation of the formal judgment, for it appears that the City of Bakersfield has attempted to utilize the injunctive process to enforce the criminal provisions of building ordinance No. 1242, New Series, in a suit which does not claim the existence of a nuisance.

The motion of appellant to augment the record by the inclusion of his affidavit, dated August 14, 1964, on motion for a new trial, including the photographs attached as exhibits, is granted. The only question involved was whether the appellant had a right to move for a new trial because his counsel previously had made a similar motion which was denied after the filing of the first judgment on June 30, 1964. However, after the arguments on the first motion for a new trial, the court made an order that "the Findings of Fact and Conclusions of Law and Judgment are Amended. . . ," and a second judgment was thereafter filed on July 23, 1964. As a result, it was proper for Mr. Miller after the retirement of his counsel to file a notice of intention to move for a new trial as he did on July 24, 1964. (Code Civ. Proc., § 662; *Neff* v. *Ernst*, 48 Cal.2d 628, 634.)

While appellant Miller's notice of appeal was filed August 24, 1964, he incorrectly states that he appeals from the judgment of June 30, 1964; in spite of *Neff* v. *Ernst, supra,* his notice was filed *after* the second

judgment was filed on July 23, 1964, and under the rule of *Collins* v. *City & Co. of S. F.*, 112 Cal.App.2d 719, will necessarily be construed to be an appeal from the second judgment.

The judgment is reversed.

/s/ Conley
P.J.

I Concur:

/s/ Stone
J.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

CITY OF BAKERSFIELD,
Plaintiff, Cross-defendant
and Respondent,
v.
MILTON MILLER,
Defendant, Cross-complainant
and Appellant.

L.A. 28224

(Filed Feb 4 1966)

In this appeal the defendant challenges the power of a municipality to determine that an existing building, failing to conform to current standards of safety incorporated in a municipal building code enacted since the construction of the building, is a public nuisance. The trial court determined that defendant's hotel constituted a public nuisance under a City of Bakersfield ordinance and ordered that the statutory violations be corrected or that the upper floors of the building be vacated. Defendant's cross-complaint, which sought to enjoin the city from posting signs proclaiming that the building is unsafe, was dismissed.

We conclude that the city acted within its constitutional and statutory powers in enacting and enforcing the ordinance and that the resultant judgment deprives defendant of no constitutionally protected right.

Defendant is the owner of record of the Hotel Padre, an eight-story building constructed in the central area of Bakersfield in 1929. His acrimonious dispute with the city originated in the autumn of 1955 when he received notice that the hotel did not conform to the city building code. There followed an interminable series of confer-

ences between defendant and various city officials in which defendant repeatedly claimed that he was financially unable to accomplish the required repairs and modifications. Initially the discussions were amicable, and defendant's protestations of impecuniosity were considered sympathetically. For several years city officials attempted to persuade defendant to voluntarily comply with the ordinance, but no attempt was made to compel him to do so. In 1959 a captain of the fire department suggested that he take some step to demonstrate good faith, and early the following year defendant modified a fire escape so as to comply with the code. Except for this sole improvement, defendant has totally failed to remedy the building code violations existing in the hotel.

With the passage of time the city became increasingly impatient with defendant's indifference and less responsive to his chronic pleas of financial hardship. In August 1960 he was formally notified that the building violated the ordinance with reference to specific shortcomings, and the city demanded that he undertake some corrective action within 48 hours. This directive was ignored, and another meeting with defendant was held in February 1961. At this session defendant refused to commit himself to any course of action, not even to the commencement of compliance with the ordinance. Shortly thereafter the city council passed a resolution requesting him to install a sprinkler system in the basement and on the first floor of the hotel within six months and to modify successive floors of the building at regular intervals. The entire building was to conform to the code within 12 years. Defendant's only response to this resolution was to erect what he described as an "Alamo-Tombstone sign" on the building to herald his defiance of the city council. On September 1, 1961, this action was filed and the city posted notices on the building warning that it was unsafe for occupancy.

The complaint filed by the city alleges that the Padre Hotel constitutes a fire hazard and a public nuisance as defined by a city ordinance enacted in May 1959.

This ordinance adopted by reference the 1958 edition of the Uniform Building Code, drafted by the International Conference of Building Officials. Earlier editions of the code had been in effect in Bakersfield since 1951, and it appears that the portions of the code at issue in this case have not been materially modified since the date of its first adoption by the city.

The Uniform Building Code has been enacted by many cities throughout the state. The authority of local agencies to adopt such uniform codes by reference is specifically provided by Government Code sections 50022.1-50022.8, and the practice of adoption by reference has been judicially approved. (*Nat. Milk etc. Assn.* v. *City etc. of S.F.* (1942) 20 Cal.2d 101, 115-116, vacated as moot on federal question in (1943) 317 U.S. 423, and readopted in (1944) 24 Cal.2d 122.) In *Agnew* v. *City of Culver City* (1956) 147 Cal.App.2d 144, 153-157, the court criticized the practice of adopting codes promulgated by private associations if the intent is to adopt in advance changes which the association might choose to make at some future time (*Brock* v. *Superior Court* (1937) 9 Cal.2d 291, 297-298; but see Ex parte Gerino (1904) 143 Cal. 412, 418-419). However, these cases are inapposite since the City of Bakersfield adopted an existing text.

Undisputed evidence at the trial demonstrated that the Padre Hotel violates several provisions of the uniform code. The interrior stairways are unenclosed and leave an open shaft in the building from the second floor to the roof. The elevator shafts are improperly enclosed; other shafts and ducts contain combustible materials and cannot be closed off by dampers. The boiler room is not separated from the rest of the building by fire resistant materials; exit signs are not of the required size and are inadequately illuminated; and the fire escapes are improperly constructed, with the exception of the one improved in 1960. The sleeping rooms of the hotel are connected with the hallways by doors

with transoms above them, and it is necessary to keep the transoms open during much of the year because the hallways are used as a return duct for the hotel's air-cooling system.

There is evidence in the record that the hotel is constructed of noncombustible materials and therefore might be deemed a fireproof building. However, experts testified that devastation from fire comes not merely from the flames but substantially from the smoke which the fire produces. They stated that the construction of the hotel was such that if a fire started in one of the rooms, the smoke would almost immediately enter the hallways through the open transoms, carried by the forced air from the cooling system, and would quickly travel through the open ducts and stairways to all floors of the building. Thus, even though the building might be described as fireproof, expert testimony indicated that it could reasonably be considered to be unsafe for occupancy as a hotel because of the danger of spreading smoke.

The trial court concluded that the hotel constitutes a fire hazard within the meaning of the uniform code adopted by the city and that under the terms of section 203(a) of the code it is a public nuisance.

Defendant does not deny that the ordinance has been violated. However, he contends that the city exceeded its legislative powers in declaring as a matter of law that such violations constitute a public nuisance and maintains that the trial court erred in failing to make an independent finding as to whether the building was in fact a nuisance under state law.

The Legislature has defined in general terms the word "nuisance" in Civil Code section 3479, which states, "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable

enjoyment of life or property . . . is a nuisance.'"[1] In *People* v. *Linn* (1941) 18 Cal.2d 872, the prosecutor requested that the court enjoin gambling operations of the defendant; it was not alleged that gambling activities were within the definition set forth in Civil Code section 3479, but the People maintained that this statutory definition is not exclusive and that the court was empowered by the common law to restrain such activities. This contention was rejected. The court noted that the term "nuisance" is peculiarly amorphous, and concluded that "In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature." (*People* v. *Lim, supra,* at p. 880.)

Although this court has thus held that "nuisance" is a term for the Legislature to define, the semantics of Civil Code section 3479 provide little guide in ascertaining the degree of danger which must be present for a condition or an activity to be considered a nuisance. Almost all human activity involves some risk, and in circumstances in which Civil Code section 3479 is the only applicable statute, considerable judicial discretion has been allowed in determining whether an alleged danger is sufficiently serious to justify abatement. However, in certain areas of law the term has been defined with more particularity. Thus, California Administrative Code, title 8, section 17200.65, which is a part of the state housing regulations, provides that overcrowding,

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[1] Civil Code section 3480 states, "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons. . . ." It is clear that if the Padre Hotel is a nuisance, it would be classified as a public nuisance under this section.

insufficient ventilation and illumination, inadequate plumbing and other similar conditions within certain buildings shall be deemed public nuisances. Legislation in other fields has defined the term with even greater specificity.[2]

Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.

City legislative bodies are empowered by Government Code section 38771 to declare what constitutes a nuisance. Since even without this section cities would have the power to abate public nuisances (Code Civ. Proc., § 731) and to impose criminal sanctions upon those maintaining public nuisances (Pen. Code, § 373a) it seems evident that Government Code section 38771 does more than permit cities to adopt as municipal ordinances provisions which have already been enacted as state statutes; such an interpretation would make the section superfluous. It may be contended that the section delegates to municipalities only the power to declare as nuisances specific conditions within the general areas of regulation enumerated in Civil Code section 3479, but we do not reach this question here since a fire hazard clearly constitutes a nuisance within the provisions of section 3479. (See, e.g., *People* v. *Wing* (1905) 147 Cal. 382, 383; *County of San Diego* v. *Carlstrom* (1961) 196 Cal. App. 2d 485, 491; *Yen Eng* v. *Board of Building & Safety Comrs.* (1960) 184 Cal. App. 2d 514, 521; *Perepletchikoff* v.

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[2] For example, Streets and Highways Code section 670, subdivision c, provides that the placing of an unauthorized sign in, above, or below a highway is a nuisance, as is conducting a business without compensation security (Lab. Code, § 3712), or the presence of camelthorn, Austrian field cress or black currant on one's property (Agr. Code, §§ 159-160).

City of L. A. (1959) 174 Cal. App. 2d 697, 701.) Therefore, the City of Bakersfield has the power to define by statute the standards by which courts are to judge whether a nuisance exists, and the trial court did not err in refusing to decide this case on the basis of common law concepts or of the general provisions of Civil Code section 3479.

Defendant's contention that state housing requirements have preempted this field of regulation is without merit. While the state housing provisions are detailed and comprehensive (see Cal. Admin. Code, tit. 8, ch. 9), Health and Safety Code section 17951 specifically provides that a city or county may impose standards which equal or exceed the state regulations. This provision would not validate a city ordinance if it in fact conflicted with a state statute (*Nat. Milk etc. Assn.* v. *City etc. of S. F.* (1942) supra, 20 Cal. 2d 101, 111, vacated as moot on federal question in (1943) 317 U.S. 423, and readopted in (1944) 24 Cal. 2d 122), but conflict is precluded by Health and Safety Code section 19825 which provides that the state statutes and regulations shall be inapplicable within cities which adopt such ordinances.

Section 203a of the Uniform Building Code does not, as defendant implies, declare that buildings which violate the code only in some minor or technical respect are nuisances; it proscribes as nuisances only those buildings which contain some condition which would seriously endanger public health or safety.[3] The provisions of the section are not unreasonable, and the finding of the trial court that the building constitutes a fire hazard within the meaning of this section is amply supported by the evidence.

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[3] Section 203a provides in relevant portion, "All buildings or structures which are structurally unsafe or *not provided with adequate egress, or which constitute a fire hazard,* or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment, as specified in this Code or any other effective ordinance, are, for the purposes of this Section, unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances. . . ." (Italics added.)

Thus, we reach the question whether standards of fire safety incorporated in the code are unconstitutional as applied to buildings which were constructed prior to its enactment and which at the time of construction conformed to all existing statutes. Defendant asserts that the costs of remodeling the building to conform to the code would be excessive and thus deprive him of property without due process of law.

The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance. (*Queenside Hills Co.* v. *Saxl* (1946) 328 U.S. 80, 83; *Knapp* v. *City of Newport Beach* (1960) 186 Cal. App. 2d 669, 681.) In this action the city does not seek to impose punitive sanctions for the methods of construction used in 1929, but to eliminate a presently existing danger to the public. It would be an unreasonable limitation on the powers of the city to require that this danger be tolerated ad infinitum merely because the hotel did not violate the statutes in effect when it was constructed 36 years ago.

In considering the constitutionality of a housing code, we do not overlook the evident fact that the cost of modification of an existing building will in most cases be more expensive than incorporating the required safety features into the original design of a new building. Thus, it has been recognized that a building code may constitutionally impose stricter standards for newly constructed buildings than for those which existed at the time the code was enacted (*Matter of Stoltenberg* (1913) 165 Cal. 789, 794). The Uniform Building Code makes such a distinction. However, the constitutional criteria to be applied in either case are whether the expenses necessarily incurred in complying with the statute and the sanctions imposed for noncompliance are reasonable in relation to the public health or safety interest being protected.

Defendant presented evidence at the trial that it would cost a minimum of $68,000 to modify the hotel to comply with all provisions of the building code. The closing of the

transoms would render the hotel's cooling system inoperative, and the cost of modifying the building and installing new air conditioners would be approximately $127,000. As an alternative, the city agreed to waive all code requirements if defendant would install an approved automatic sprinkler system throughout the hotel; the minimum cost of installing such a system would be $54,600. Defendant claims that the installation of sprinklers would necessitate the construction of false ceilings in order to conceal the pipes and preserve attractive qualities of the hotel. While the aesthetic appeal of a hotel is not to be disparaged, the trial court was justified in considering it secondarily in weighing the validity of the city's concern for public safety.

Defendant estimates that the present value of the building, exclusive of the land on which it is situated, is $100,000, but he also admits that federal tax assessors valued it at $250,000 when he purchased a majority interest in the building in 1954, and that it is assessed at an even higher figure by local tax authorities. Thus it appears that the city's repair requirements were not inordinately costly, even in relation to the most conservative of these valuations.

In appropriate circumstances, a governmental agency may abate a public nuisance even though to do so requires that a building be demolished. (*Yen Eng* v. *Board of Building & Safety Comrs.* (1960) supra, 184 Cal. App. 2d 514; *Takata* v. *City of Los Angeles* (1960) 184 Cal. App. 2d 154; *People* v. *Ryan* (1936) 17 Cal. App. 2d 1; *People* v. *Foerst* (1935) 10 Cal. App. 2d 274.) In most of the foregoing decisions the danger appeared to be of greater magnitude than that involved in the cause at hand, but the remedy was also more drastic. In this case, compliance with the ordinance would in all probability result in increased value of the hotel rather than diminution or destruction as in the cases listed above. Under such circumstances the statutory mandate is not unconstitutionally onerous.

The contention was made that the ordinance by its terms discriminates against the owners of certain buildings and deprives them of the equal protection of the laws, since the building code provisions involved here apply only to hotels and apartment houses containing more than two stories. On that subject expert witnesses testified that the height of a building is a factor accelerating the danger to occupants who might be trapped during a fire and that hotels are particularly vulnerable to fires. In addition, it should be noted that this height classification is a part of the Uniform Building Code which was in effect prior to the time defendant purchased a majority interest in the hotel. Therefore, his assertion that the code was enacted by the city for the purpose of discriminating against him is unconvincing, and no unequal protection of the laws appears.

The evidence also fails to support defendant's claim that city officials have discriminated against him in enforcing the ordinance. The relevant code provisions apply to 13 buildings within the City of Bakersfield, and the owners of two of the buildings have voluntarily vacated upper floors of the structures at the request of the city. The other 11 buildings either have been remodeled so as to substantially comply with the code or were in the process of effecting such modifications at the time of the trial. Defendant was first notified of the code violations in 1955; it would seem that a decade offers ample opportunity to correct the violations at a moderate pace.

It is undisputed that conditions within the Hotel Padre violate provisions of the Uniform Building Code which has been adopted by the City of Bakersfield. The substantive provisions of the code deprive defendant of no right protected by the Constitution, and it is clearly within the statutory powers of the city to declare that buildings violating the ordinance in ways which directly affect the health and safety of the public are public nuisances. Therefore, the trial court did not err in ordering that the nuisance be abated.

The cross-complaint, in which defendant sought relief from the posting of signs on his premises without an opportunity to be heard, was properly dismissed. The trial itself constituted a public hearing on the matter.

The judgment is affirmed.

MOSK, *J.*

We Concur:

TRAYNOR, *C. J.*
McCOMB, *J.*
PETERS, *J.*
TOBRINER, *J.*
PEEK, *J.*
BURKE, *J.*

APPENDIX D

UNIFORM BUILDING CODE

Unsafe Buildings

Sec. 203. (a) General. All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment, as specified in this Code or any other effective ordinance, are, for the purpose of this Section, unsafe buildings.All such unsafe buildings are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition, or removal in accordance with the procedure specified in Subsections (b), (c), (d), and (e) of this Section.

(b) Notice to Owner. The Building Official shall examine or cause to be examined every building or structure or portion thereof reported as dangerous or damaged and, if such is found to be an unsafe building as defined in this Section, the Building Official shall give to the owner of such building or structure written notice stating the defects thereof. This notice may require the owner or person in charge of the building or premises, within 48 hours, to commence either the required repairs or improvements or demolition and removal of the building or structure or portions thereof, and all such work shall be completed within 90 days from date of notice, unless otherwise stipulated by the Building Official. If necessary, such notice shall also require the building, structure, or portion thereof to be vacated forthwith and not reoccupied until the required repairs and improvements are completed, inspected, and approved by the Building Official.

Proper service of such notice shall be by personal service upon the owner of record, if he shall be found within the city limits. If he is not found within the city limits such

service may be made upon said owner by registered mail or certified mail, provided, that if such notice is by registered mail or certified mail, the designated period within which said owner or person in charge is required to comply with the order of the Building Official shall begin as of the date he receives such notice.

(c) Posting of Signs. The Building Official shall cause to be posted at each entrance to such building a notice to read: "DO NOT ENTER. UNSAFE TO OCCUPY. Building Department, City of ....." Such notice shall remain posted until the required repairs, demolition, or removal are completed. Such notice shall not be removed without written permission of the Building Official and no person shall enter the building except for the purpose of making the required repairs or of demolishing the building.

(d) Right to Demolish. In case the owner shall fail, neglect, or refuse to comply with the notice to repair, rehabilitate, or to demolish and remove said building or structure or portion thereof, the City Council may order the owner of the building prosecuted as a violator of the provisions of this Code and may order the Building Official to proceed with the work specified in such notice. A statement of the cost of such work shall be transmitted to the City Council, who shall cause the same to be paid and levied as a special assessment against the property.

(e) Costs. Costs incurred under Subsection (d) shall be paid out of the City Treasury. Such costs shall be charged to the owner of the premises involved as a special assessment on the land on which the building or structure is located, and shall be collected in the manner provided for special assessments.

Violations and Penalties

Sec. 205. It shall be unlawful for any person, firm, or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy, or maintain any building or structure in the city, or cause the

same to be done, contrary to or in violation of any of the provisions of this Code.

Any person, firm, or corporation violating any of the provisions of this Code shall be deemed guilty of a misdemeanor, and each such person shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this Code is committed, continued, or permitted, and upon conviction of any such violation such person shall be punishable by a fine of not more than $300, or by imprisonment for not more than 90 days, or by both such fine and imprisonment.

APPENDIX E

CHAPTER 13—EXISTING BUILDINGS

Sec. 1309. (a) Purpose. The purpose of this Section is to provide a reasonable degree of safety to persons living and sleeping in apartment houses and hotels through providing for alterations to such existing buildings as do not conform with the minimum safety requirements of this Code.

(b) Scope. The provisions of this Section shall apply exclusively to existing nonconforming Group H Occupancies more than two stories in height.

(c) Effective Date. Eighteen months after the effective date of this Section, every building falling within its scope shall be vacated until made to conform to the requirements of this Section.

(d) Number of Exits. Every apartment and every other sleeping room shall have access to not less than two exits. A fire escape as specified herein may be used as one required exit.

(e) Stair Construction. All stairs shall have a minimum run of nine inches (9″) and a maximum rise of eight inches (8″) and a minimum width exclusive of handrails of thirty inches (30″). Every stairway shall have at least one handrail. A landing having a minimum horizontal dimension of thirty inches (30″) shall be provided at each of access to the stairway.

(f) Interior Stairways. Every interior stairway shall be enclosed with walls of not less than one-hour fire-resistive construction.

Where existing partitions form part of a stairwell enclosure, wood lath and plaster in good condition will be acceptable in lieu of one-hour fire-resistive construction.

Doors to such enclosures shall be protected by a self-closing door equivalent to a solid wood door not less than one and three-fourths inches (1¾″) thick. Enclosures shall include landings between flights and any corridors, passageways, or public rooms necessary for continuous exit to the exterior of the building.

The stairway need not be enclosed in a continuous shaft if cut off at each story by the fire-resistive construction required by this Subsection for stairwell enclosures.

• • •

(g) Exterior Stairways. Exterior stairs shall be incombustible or of wood of not less than two-inch (2″) nominal thickness with solid treads and risers.

(h) Fire Escapes. Fire escapes may be used as one means of egress, if the pitch does not exceed 60 degrees, the width is not less than eighteen inches (18″), the treads are not less than four inches (4″) wide, and they extend to the ground or are provided with counterbalanced stairs reaching to the ground. Access shall be by an opening having a minimum dimension of twenty-nine inches (29″) when open. The sill shall be not more than thirty inches (30″) above the floor and landing.

(i) Doors and Openings. Exit doors shall swing in the direction of exit travel, shall be self-closing, and shall be openable from the inside without the use of key or any special knowledge or effort. Doors shall not reduce the required width of stairway more than six inches (6″) when open. Transoms, and openings other than doors, from corridors to rooms shall be fixed closed and shall be covered with a minimum of three-fourths-inch (¾″) plywood.

(j) Exit Signs. Every exit doorway or change of direction of a corridor shall be marked with a well-lighted exit sign having letters at least five inches (5″) high.

(k) Enclosure of Vertical Openings. Elevators, shafts, ducts, and other vertical openings shall be enclosed as required for stairways in Subsection (f) or by wired glass set

in metal frames. Doors shall be incombustible, or as regulated in Subsection (f).

(l) Separation of Occupancies. Occupancy separations shall be provided as specified in Section 503. Lobbies, and public dining rooms not including cocktail lounges, shall not require a separation if the kitchen is so separated from the dining room. Boiler rooms or heater rooms containing a central heating plant using solid or liquid fuel shall be separated from the rest of the building by a Three-Hour Fire-Resistive Occupancy Separation as specified in Chapter 5.

(m) Alternates. No alternate method of obtaining the fire protection and safety required by this Section may be used unless the Board of Appeals, including as a voting member for this purpose the Chief of the Fire Department, finds that such alternate method provides protection and safety equivalent to that required herein.

APPENDIX F

CALIFORNIA CODE

Pt. 1.5 ADMINISTRATION—ENFORCEMENT § 17980

§ 17980. Institution by enforcement agency; notice to abate nuisance. If any building is constructed, altered, converted, or maintained in violation of any provision of, or of any order or notice giving a reasonable time to correct such violation issued by an enforcement agency pursuant to, this part and rules and regulations promulgated thereunder, or if a nuisance exists in any building or upon the lot on which it is situated, the enforcement agency shall after 30 days' notice to abate such nuisance institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance. (Added Stats. 1961, c. 1844, p. 3925, § 8.)

APPENDIX G

CALIFORNIA CODE

ADMINISTRATION—ENFORCEMENT

§ 17981. Temporary relief pending final judgment. An enforcement agency which institutes any action or proceeding pursuant to this article may, by verified complaint setting forth the facts, apply to the superior court for an order granting the relief for which the action or proceeding is brought until the entry of a final judgment or order. (Added Stats. 1961, c. 1844, p. 3925, § 8.)

§ 17982. Order to remove violation or abate nuisance. If any notice or order issued by an enforcement agency is not complied with within a reasonable time as specified in such notice or order the enforcement agency may apply to the superior court for an order authorizing it to remove any violation or abate any nuisance specified in the notice or order. (Added Stats. 1961, c. 1844, p. 3925, § 8.)

APPENDIX H

CALIFORNIA CODE

ADMINISTRATION—ENFORCEMENT

§ 3369. Unavailability to enforce penalty, forfeiture, or penal law; exceptions; nuisance; unfair competition; definitions; injunctions, who may prosecute

1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Penal Code sections 654a, 654b or 654c.[1]

4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public. (Enacted 1872. As amended Stats. 1933, c. 953, p. 2482, § 1.)